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In the Supreme Court

OF THE

United States

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OCTOBER TERM, 1948

No. 233

JOAN BRODEL (professionally known as Joan Leslie),
Petitioner,

vs.

WARNER BROS. PICTURES, INC. (a corporation),
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of the State of California
AND
BRIEF IN SUPPORT THEREOF.

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to the Supreme Court of the State of California.

The petitioner, Joan Brodel, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California entered in the above entitled cause on May 3, 1948 (Record, p. 14), reversing the judgment of the District Court of Appeal of the State of California, Division Two, entered on March 25, 1947, which judgment affirmed

the judgment of the Superior Court of the State of California, County of Los Angeles entered on May 20, 1946, sustaining the demurrer of the petitioner here (the defendant in the trial Court) to the complaint of the respondents here (Warner Bros.) without leave to amend.

QUESTIONS PRESENTED.

1. The Supreme Court of California erred in finding that Section 36 of the Civil Code of the State of California, which arbitrarily designates three classes of minor employees who are denied the right to disaffirm their contracts, is not in violation of the Fourteenth Amendment of the Constitution of the United States, which forbids denial by the State of the equal protection of the laws.

2. The Supreme Court of California erred in accepting the interpretation of the Act of 1927 by the Legislature of 1947, and yielding to the attempt of the Legislature to usurp the judicial function of interpreting a past statute, in violation of the Fourteenth Amendment of the Constitution of the United States, which forbids denial of due process of the law.

3. The amendment of 1947 is unconstitutional in that it impairs the obligation of a contract contrary to Article I, Section 10, of the Constitution of the United States.

In preliminary support of the petition, the petitioner desires to urge for the consideration of this Court the following:

THE JUDGMENT OF THE SUPREME COURT IN THIS CASE IS A FINAL JUDGMENT.

This Court has repeatedly declared that whether the judgment of a State Court is final or not does not depend on the designation which the State Court gives to its judgment nor on the terms used by the State Court in reaching its result, but depends on the situation created by the judgment which is sought to be reviewed. The fact that the case is remanded to the Court below without directions to enter a judgment is not conclusive. This is true even if the term "remanded" is used. This term "remanded", it will be noted, is not used by the Court in disposing of the appeal. (Record, p. 24.)

Dept. of Banking v. Pink, 317 U. S. 264, 268.

> "For the purpose of the finality which is prerequisite for review in this Court, the test is not whether the judgment is denominated final (Wick v. Sup. Ct., 278 U. S. 575; Cheltenham & Abington Sewerage Co. v. Penn. Public Ut. Comm. *post* p. 588) but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that the adjudication is not subject to review by a state court."

Cf. also

Largent v. Texas, 318 U. S. 418, 419-420.

In that case the petitioner, convicted in a County Court from which there was no appeal, could have had the constitutionality of his conviction tested by *habeas corpus.* The Court says:

"The possibility that the appellant might obtain release by a subsequent and distinct proceeding, and one not in the nature of a review of the pending charge, in the same or a different court of the state, does not affect the finality of the existing judgment."

Cf. also

Bandini v. Sup. Court, 284 U. S. 8, 14.

And

Cole v. Violette, 319 U. S. 581.

In the last case, this Court regarded an order of the Supreme Judicial Court as final, even though in the practice of Massachusetts, further proceedings were necessary in the State Superior Court.

But especially we should like to refer to *Richfield Oil Co. v. State Board of Equalization,* 329 U. S. 69 (67 Sup. Ct. 156) in which it is said at page 72:

"The designation given the judgment by state practice is not controlling. Dept. v. Pink, 317 U. S. 264, 268. The question is whether it can be said that 'there is nothing more to be decided' (Clark v. Williard, 292 U. S. 112, 118) that there has been 'an effective determination of the litigation'. Market St. Ry. Co. v. Railroad Comm., 324 U. S. 548, 551; see Radio Station WOW v. Johnson, 326 U. S. 120, 123-124."

If these tests are applied, it will be seen that, in the words of this Court, "there is nothing more to be decided" by the State Court, and "there had been an effective determination of the litigation."

The Supreme Court of California reversed the Courts below and, as the opinion discloses, decided adversely to the petitioner herein, rejecting all her contentions both on the non-Federal and the Federal questions. Although no specific order was issued for a new trial, the petitioner herein (defendant in the Court below) is obviously foreclosed on all the defenses she could possibly raise, if there is to be a new trial. All the Courts of California, so far as this case is concerned, would be bound by the decision of the Supreme Court of California and would be required to give judgment against the petitioner, just as effectively as if the Supreme Court of California had in express terms ordered judgment to be entered against her. The "new trial" and the judgment would be essentially a formal proceeding since the Superior Court of California would be without power to overrule the Supreme Court of California on questions definitely litigated here.

Nor can new questions arise. The opinion of the Supreme Court of California asserts that the plaintiff Warner Bros. "intends to amend its complaint." Nothing in the record supports this statement. On the contrary, there is overwhelming evidence that it will not do so and has no need of doing so. The Supreme Court decided that on the complaint, the plaintiff had a cause of action for an injunction under the appropriate sections of the Civil Code of California and that these sections were constitutional. That amply fulfills the plaintiff's prayer (Record, p. 11.)

both for a declaration of its rights and for an injunction.

The only other relief would be any claim for damages. Obviously if the plaintiff has a right to an injunction against a breach of a contract, it also has a right to damages instead of an injunction, if it is possible to assume that any damages have been sustained.

We should like to call attention to the case of *Wirth & Hamid Fair Booking v. Wirth*, 265 N. Y. 214, 192 N. E. 297, 301.

> "The remedy at law for a breach of contract is the collection of damages. Only where that remedy is inadequate may the equitable remedy of specific performance be invoked. A decree of specific performance is in effect and, in this case, even in form, an injunction to prevent a breach of the contract. *Quite obviously a suit for injunction against a breach of contract is inconsistent with a claim for damages caused by the same breach.*" (Emphasis added.)

The plaintiff may claim to have included this in the formal addition to its prayer. (Record, p. 12.) "6. For such further relief as may be proper." But plaintiff in Paragraph XII of its complaint asserts that no remedy but an injunction is "adequate" which implies that damages cannot in fact be computed. This is repeated in Paragraph XIV (Record, pp. 9, 10) and is the gist of the whole action.

It is the practice of this Court to look behind the form and examine the actual situation involved. This

case is not like the cases of condemnation cited in *Catlin v. U. S.*, 324 U. S. 229, in which the estimate of the amount to be paid is an essential part of the action and until that estimate is made, the judgment cannot be final. In those cases, it is certain that some compensation would be paid and there might be further litigation as to whether the amount would be just. The same may be said of those cases referred to a master for an accounting. *Mississippi R. Co. v. Smith*, 295 U. S. 718 (1935) and *Bruce v. Tobin*, 245 U. S. 18 (1917.) In all these instances, some amount was sure to be found due. In this case, it is quite inconceivable that any method could be devised to show how the loss of money—which is not even alleged by the plaintiff—could be computed. It is apparent from the plaintiff's own allegations in Paragraph XIV (Record, p. 10) that computation is impossible.

The purposes of refusing review to any judgment but a final one are stated in the case of *Catlin v. U. S.* (above, p. 7.) It is to prevent "piece-meal litigation." But there is no such danger here, if review is granted of the Federal questions involved. All the Federal questions that can be raised in this case are now before this Court and no new ones can be presented. The only effect of refusing review is to compel the petitioner to go through the form of raising them over again in the three Courts of California where they must inevitably be rejected and then after a delay, which may amount to several years, once more applying to this Court for review under the precise circumstances that are present here and now.

It is a well-known rule that when the highest Court reverses a judgment and leaves the Court below only the ministerial act of entering judgment for the appellant, that this is a final judgment and gives the United States Supreme Court jurisdiction to review the case. In this instance, the Court below has, in fact, if not in form, only a ministerial act to accomplish, since it cannot lawfully render any judgment in this cause except in favor of the appellant Warner Bros. (the respondent here).

The great hardship imposed on the petitioner of being compelled to litigate over again at a great expense of time and money, to a foregone conclusion, what is essentially nothing more than a ministerial act, is quite apparent.

If substance and not form is considered, it is submitted that the judgment of the State Supreme Court in this cause is a final judgment.

CONCLUSION.

The petition for a writ of certiorari should be granted.

Dated, Berkeley, California,
July 30, 1948.

Respectfully submitted,
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JOAN BRODEL (professionally known as Joan Leslie),
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BRIEF IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of the State of California.

POINT I.

THE SUPREME COURT OF CALIFORNIA ERRED IN FINDING THAT SECTION 36 OF THE CIVIL CODE OF THE STATE OF CALIFORNIA, WHICH ARBITRARILY DESIGNATES THREE CLASSES OF MINOR EMPLOYEES WHO ARE DENIED THE RIGHT TO DISAFFIRM THEIR CONTRACTS, IS NOT IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES, WHICH FORBIDS DENIAL BY THE STATE OF THE EQUAL PROTECTION OF THE LAWS.

There is a very natural and intelligible disinclination on the part of the Courts to declare legislation void as unconstitutional. This is especially noticeable when the Courts are asked to apply the requirement of the Fourteenth Amendment that no state shall deny its citizens and residents the equal protection of the laws. No one doubts that this forbids what is called class legislation and legislation in favor of individuals or against individuals. And equally no one questions, that, as the Supreme Court of California suggests in the instant case and the cases cited in support of it, a large discretion must be allowed to the legislature in determining what legislation is necessary, even if it adversely affects certain classes of the community.

But as these cases emphatically declare, this discretion is in no sense arbitrary. The legislature must have, or it must be possible to find, a reasonable and natural basis of any classification which is implied or expressly provided in a statute.

And the Courts cannot close their eyes to the fact, which is regrettably apparent in the statute under discussion (California Civil Code, § 36) that

legislatures respond to pressures in which economic interests are all too clearly present. There is not the slightest suggestion that this response has any improper background. Lobbyists are often extremely persuasive, and legislatures in matters where large public questions are not involved, are easily hurried into action of which the legislators do not see all the effects.

So many statutes are passed under these pressures, that, it is respectfully urged, the highest tribunal in the United States is fully justified in examining more closely than the Supreme Court of California has felt it proper to do, the exercise of a legislative discretion which results in this extraordinary situation, the situation, that is to say, which confers on the *producers of moving pictures and of plays,* the *owners of race-horses,* the *managers of prize-fighters and like,* a substantial and lucrative privilege which is not enjoyed by other corporations and individuals who make contracts with talented minors.

It is with this in mind that the petitioner undertakes to present for consideration the contention that the basis on which the Supreme Court of California offers to sustain this astounding piece of legislation is quite inadequate.

The Court declares (R. p. 23), "It can hardly be questioned that there are reasonable grounds for the statutory provisions withdrawing the right of disaffirmance from minors with regard to contracts to render services in the professions specified in Sec-

tion 36, if such contracts are found reasonable by a Court in a special proceeding for the examination thereof. Whether certain other groups of minors engaged in professions similar to those specified in Section 36 should be included is a matter of legislative discretion. New legislation such as this ordinarily first covers the field where it is most urgently needed, and may be extended in the light of experience."

The Court then quotes a number of cases.

In the *Western Fruit Growers* case (22 Cal. 2, 506) it was declared:

> "That a law is a general one, when it applies equally to *all persons* embraced in a class founded upon *some natural, intrinsic and constitutional distinction;* on the other hand, it is special legislation if it confers *particular privileges* or imposes *particular disabilities* or burdensome conditions in the exercise of a common right, upon a class of persons *arbitrarily* selected from the general body of those *who stand in precisely the same relation* to the subject of the law." (Emphases added.)

No exception whatever can be taken to this statement of the law, and it is submitted that if the rule is applied to the facts of this case it will be apparent that it strongly supports the petitioners' contention. Section 36 does *not* apply equally *"to all persons embraced in a class* founded upon some *natural, intrinsic and constitutional* distinction."

If we omit the word "constitutional" which begs the question, what is the *natural* and *intrinsic* distinction, which separates the three classes here selected from "the general body of those who stand in the same relation to the subject of the law"? The three classes consist of (1) dramatic producers and their minor actors and actresses; (2) employers of minor participants or players in professional sports including but not limited to boxers, wrestlers, and jockeys. The one common characteristic of the employees is that they must have exceptional skill and talent in their field, and that it is a field in which minors frequently exhibit such talent. This certainly is a natural and intrinsic element. But it is notorious and a matter of general knowledge, a matter of which all Courts may take judicial notice, that musicians frequently exhibit this high talent as minors. Indeed "infant prodigies" were known in this field long before they were known in the dramatic field. Exceptional talent is often found among young scientists and inventors who may make contracts with employers. What "natural and intrinsic" characteristic separates these classes?

The Court gives us no help in this. Certainly if any selection is "actually and palpably unreasonable and arbitrary" it is one which takes exceptionally talented minors and divides them into groups, some of which are deprived of the privilege of rescinding their contracts—a privilege which in California they can, after the age of 18, exercise only on equitable

conditions—and some are not. It is to be feared that the only distinction between the sub-classes here arbitrarily separated lies in the superior strength of the pressure groups which were active on behalf of the dramatic producers and the "sporting fraternity."

In the *Fruit Growers* case, the same standards of operation were required for both groups and both were fruit-growers. In *Rainey v. Michel* (6 Cal. (2d) 259, 270, 273), banks were held in themselves not to constitute an unreasonably selected sub-class of corporations. The danger from unsound banking is an obvious natural and intrinsic basis. In *Martin v. Superior Court* (194 Cal. 93, 101), the distinction between cities and counties with a population of 100,000 or over and cities and counties with less, was upheld as reasonable.

In *Title Rest. Co. v. Kerrigan,* 150 Cal. 289, 323-326, the omission of certain procedural requirements in relation to titles in San Francisco after the fire and earthquake of 1906, was held not to be an unreasonable distinction. In the case of *In re McKelvey,* 19 C.A. (2d) 94, 96, the Court held that the legislature might distinguish between wagers on horse-racing and on dog-racing. That there could be a legitimate reason for permitting a long established practice to go on while declining to permit a totally new one somewhat like it, is clear.

It is to be noted, however, that this last case was decided by an intermediate Court and that this Court felt it necessary to refer to the similar action of the

States of Illinois and of Kentucky to support it. This latter circumstance is one to which we shall recur.

It is hard to say how these cases can lend any support to a distinction that is based on no discernible natural difference and is not associated with any apparent public interest.

The Court calls attention to the fact which cannot be questioned, that the legislature may take up first one field in which a need shows itself and then go on to another. But even this one field may not be arbitrarily selected. And how can it be said that the need of regulating the contracts of minor actors and minor jockeys and prize-fighters has been shown to be the most immediately urgent subject of legislation as against other minors possessing special skill, such as musicians and inventors and others? It surely is not enough to suggest that there *might be* a reason, without indicating *what* the reason might be.

If it is seriously contended that the legislative "discretion" is absolute, then the prohibition of special legislation under the Fourteenth Amendment is completely nugatory. The Legislature has only to decide without showing any public need, that one small economic activity shall be burdened with restrictions and another left free, and the Courts will be denied the power of enquiring what the basis of the distinction is.

The petitioner has dealt so fully with these cases, in order to explain the Supreme Court of California's reluctance to deal with what under correction seems

a gross case of an arbitrary classification, and not because she regards them as in any way binding on this Court.

Before turning to the cases in this Court, cited in the opinion, it may be well to preface the discussion with the obvious statement that the four cases mentioned by the Court (*supra*, R. p. 23) evidently seem to the Court the strongest authority for their view.

If we turn to these cases we find the following:

The *Radice* case (264 U. S. 292), dealt with a law regulating hours of female employees in restaurants. The *Keokee* case (234 U. S. 224), dealt with a law forbidding the payment of employees of merchants and miners in scrip instead of money. In both instances, the laws were demonstrably based on frequent abuses injuring the health or welfare of a large number of persons affected by the laws. The *Carmichael* case (301 U. S. 495), was one involving taxation and the power of a legislature to tax arbitrarily—if it chooses—as long as no confiscation is involved—is beyond dispute.

In the case of *Bachtel v. Wilson*, 204 U. S. 36, the question was whether the cashier of a "free bank" indicted for embezzlement could be prosecuted constitutionally under Section 30 of the "Free Banking Act of Ohio" although Section 30 did not exist in other statutes permitting the conduct of banking business. The question really concerned a matter of statutory interpretation, and it was felt—no opinion had

been filed by the Supreme Court of Ohio—that the Court may have believed that other embezzling bank officials could be reached under the general criminal law, and that there was consequently no unconstitutional discrimination.

It may be noted that even in this case the Court makes the positive statement (*supra*, p. 41):

> "The power of a state legisature to select certain individuals for the operation of a statute is not an arbitrary power, one that it can exercise without regard to any principle of classification."

We may on the other side call attention to the following cases:

Gulf Railway v. Ellis, 165 U. S. 150 (1896), in which a Texas statute was considered which gave a claimant for wages against a railroad if successful, attorney's fees, a privilege which claimants for wages against other employers did not have. The Court held this to be an unconstitutional statute under the equal protection clause of the Fourteenth Amendment. The Court reviews a great many cases and fully establishes the principle.

In the case of the *Santa Fe Ry. v. Matthews*, 174 U. S. 96, in a dissenting opinion, four judges (Harlan, Brown, Peckham and McKenna) who had assented in the *Ellis* case refused to follow the Court when it attempted to distinguish a very closely similar case.

The *Gulf Ry.* case was cited with approval in the case of *Missouri Ry. v. Cade*, 233 U. S. 642, 648-649,

although the Court in the *Cade* case found that no discrimination had been practised.

It is similarly approved in such cases as *Santa Fe v. Vosburg,* 238 U. S. 56, in *Chicago & N. W. R. R. v. Nye, etc.,* 260 U. S. 35, 40, in which opinion Justices Holmes and Brandeis joined.

To say that no purpose of general welfare can be ascribed to the legislature in this legislation is not meant in disparagement of that body. It merely asserts that they were in error in supposing that such a purpose was present in the legislation presented to them and advocated by accredited representatives of the industry. In the cases in which laws have been sustained that involved some type of special legislation, it will be found that a class of persons needed protection, like the women employees in restaurants, the employees of large mining concerns forced to accept payment in scrip, or female employees in general, as in the case of *West Coast Hotel Co. v. Parrish,* 300 U. S. 379. But certainly it cannot be said that a great industry, which the Supreme Court of the United States has recently declared to have been long guilty of monopolistic practices, has a constitutional right to be protected against minor and occasional monetary losses.

We might respectfully call attention to the recent case of *Buck v. Harton,* 33 Fed. Supp. 1014, in which it was declared that the Legislature might not create a class of owners of copyrighted musical composition and give that class privileges not enjoyed by owners

of compositions protected only by common law rights. In that case it is said (p. 1020):

> "Said statute is class legislation: it is aimed only at proprietors of musical copyrights and it exempts the performance of musical works which are protected only at common law. A great many forms and varieties of copyrighted works other than musical compositions are presently and instantly dealt in, licensed and sold and otherwise made available within the State of Tennessee."

This is, to be sure, in the statement of the facts, but on page 1021, V., the Court indicates its acceptance of this contention.

Reference has been made to the fact that in the *McKelvey* case (19 Cal. App. (2d) 94, 96) cited with approval by the Supreme Court of California in the instant case (*supra*, p. 829) the Court felt it necessary to rely for support on the practice of other states. The petitioner would like to call attention to the fact that the situation which the Legislature met in a fashion which involves so arbitrary a classification, has been met by other states in a way that is not open to this objection.

That the privilege of infancy may be and has been abused can readily be conceded. The statement of Justice Crane of the New York Court of Appeals in *Sternlieb v. Normandie Nat. Sec. Corp.*, 263 N. Y. 240, 250, may be accepted with full approval.

> "That many young people under twenty-one years of age are improvident and reckless is quite evident, but these defects in judgment are by no

means confined to the young. There is another side to the question. As long as young men and women, under twenty-one years of age, are forced to make a living and enter into business transactions, how are the persons dealing with them to be protected if the infant's word cannot be taken or recognized at law? Are business men to deal with young people at their peril? Well, the law is as it is, and the duty of this court is to give force and effect to the decisions as we find them. Some states have met the situation by legislation."

The New York Law Revision Commission promptly made a study of legislation necessary to rectify these errors, and after an exhaustive study, presented a recommendation to be found in the Report of the Law Revision Commission of the State of New York for 1941, pages 45-48, which resulted in the amendment to the New York Debtor and Creditor Law, Section 260.

"§ 260. *Infants' contracts: when they may not be disaffirmed.*

1. A contract hereafter made by an infant after he has attained the age of eighteen years may not be disaffirmed by him on the ground of infancy, where the contract was made in connection with a business in which the infant was engaged and was reasonable and provident when made.

2. In any action or proceeding in which the right to disaffirm on the ground of infancy a contract made by an infant after he has attained the age of eighteen years is in issue, the burden

of proof on the question whether the contract was made in connection with a business in which the infant was engaged, and also on the question whether the contract was reasonable and provident when made, shall be upon the person seeking to deny or defeat such disaffirmance or to enforce the contract. Added L. 1941, c. 327, eff. April 13, 1941."

The Legislature in attempting to reach an admitted evil, did not single out dramatic producers, managers of prize fighters and owners of race-horses. It chose to protect *all* employers of infants against abuse of the infant's privilege of rescission. And the situation in New York is one in which the interests of dramatic producers and managers of athletic events are fully present in the minds of the public.

The same Law Revision Commission published as Legislative Document (1938) No. 65(I), "Recommendation and Study Relating to Infancy as a Defense to a Contract," submitted with Senate Introductory, No. 74, and Assembly Introductory, No. 104. In that pamphlet it lists the legislation of twenty-five states (pp. 51-67)—now twenty-six—which have sought to amend the common law privilege of infants. All of them have deprived infants of that privilege to some extent and often on the condition that the contract could be shown to be reasonable.

Only California has done this in the exclusive interests of three types of employers, who cannot be reasonably distinguished from others.

If the Legislature had limited its action to cover the contracts of minors of talent, when equal services could not be readily secured in the open market, there might be a justification. But to take even this limited classification and arbitrarily sub-classify it to include only actors and actresses, jockeys, prize fighters and other athletes, is an act for which it is practically impossible to find a rational basis.

POINT II.

THE SUPREME COURT OF CALIFORNIA ERRED IN ACCEPTING THE INTERPRETATION OF THE ACT OF 1927 BY THE LEGISLATURE OF 1947, AND YIELDING TO THE ATTEMPT OF THE LEGISLATURE TO USURP THE JUDICIAL FUNCTION OF INTERPRETING A PAST STATUTE, IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES, WHICH FORBIDS DENIAL OF DUE PROCESS OF THE LAW.

The petitioner wishes to point out that this question involving the constitutionality of the action of the Supreme Court of California, could not have been raised during the original proceedings nor before the District Court of Appeal.

The judgment in favor of the petitioner was affirmed by the District Court of Appeal on March 25, 1947 and a hearing was granted by the Supreme Court on May 22, 1947. While the case was pending in the Supreme Court, the Legislature of California amended Section 36.2 to read in part as follows:

> "A contract, otherwise valid, entered into during minority, cannot be disaffirmed upon that ground either during the actual minority of the

person entering into such contract, or at any time thereafter, in the following cases:

* * * * * * *

"2. A contract or agreement employing such person as, or wherein such person agrees to perform or render services as, an actor, actress, or other dramatic performer, or as a participant or player in professional sports, including, but without being limited to, professional boxers, professional wrestlers and professional jockeys, where such contract or agreement has been approved by the superior court in the county in which such minor resides or is employed. Such approval may be given upon the petition of either party to the contract or agreement after such reasonable notice to the other party thereto as may be fixed by said court, with opportunity to such other party to appear and be heard; and said court shall have jurisdiction to approve, and its approval when given shall extend to the whole of said contract or agreement, and of all the terms and provisions thereof, including, but without being limited to, any optional or conditional provisions contained therein for extension, prolongation or termination of the term thereof."

(Stats. 1947, ch. 526, § 1.)

It further added [Stats. 1947, ch. 526, § 2]:

"The amendment made by this act does not constitute a change in, but is declaratory of, the *preexisting law.*" (Emphasis added.)

The petitioner submits that this is an open and direct attempt to usurp the judicial function of in-

terpreting a statute, and since the exclusive power of a Court to do this, is an essential element in due process of law, the acceptance by the Supreme Court of an interpretation made by an unqualified body is a denial of such due process.

The petitioner could not have known that the Supreme Court would accept this amendment as determinative of the issues here, till the judgment by that Court on May 3, 1948. The first time, therefore, at which the constitutionality of this amendment could be called in question was after that judgment. And the petitioner here in her petition for a rehearing before the Supreme Court, duly attacked the validity of the amendment.

This amendment was not merely an attempt to give retroactive effect to a statute. It declared in set terms that the Legislature was undertaking the judicial function of interpreting an existing statute. It is so understood by the Supreme Court of California. (Record, p. 22.)

> "We are here concerned with section 36, as it read before the 1947 amendment. In 1947, after the order approving the contract between the parties had been entered the provisions of section 36 were amended by the Legislature. The intent of the Legislature was to leave no doubt as to the meaning of section 36, and in no wise to change it, for it declared: 'The amendment made by this act does not constitute a change in, but is declaratory of, the preexisting law.' (Stats. 1947, ch. 526 § 2.)"

The time at which the amendment was passed leaves little doubt that the Legislature had this case in mind and desired to do *nothing less than reverse the judgment of the District Court of Appeal in the very case it had decided,* not merely change the law on the subject.

It may be noted that the amendment was passed with considerable speed. The rehearing in the District Court of Appeal was denied on April 9, 1947. [179 Pac. (2d) 57]. The bill to amend section 36.2 was introduced in the California Assembly on April 16, 1947. It was approved by the Senate and approved with slight changes which were concurred in by the Assembly. It was sent to the Governor on *May 26,* 1947 and approved by him on June 3, 1947. (Final Calendar of Legislative Business, Cal. Legislature, 57th Session, 1947.)

On *May 22,* 1947, before the bill was sent to the Governor, a hearing had already been granted by the Supreme Court. The obvious purpose of foreclosing a decision is apparent from the use of the term "pre-existing" law, by the Legislature.

The haste with which the Legislature rushed to override a judicial decision in a pending case is apparent from this fact. Section 36.2 was necessarily supplemented by Labor Code of California, 1640.5 [Stats. 1941, ch. 595, § 1, p. 1979], which adds the quality of disaffirmability of minors' contracts to perform dramatic services to contracts of such minors with their agents. In view of the fact that these agents are at

present a vital element in the industry, the addition was necessary, if Civil Code §36.2 is a valid enactment.

But in their haste the Legislature omitted to apply their interpretation of "pre-existing law" to Labor Code 1640.5, so that the nature of the contract approved may be one thing under Civil Code § 36.2 and another under Labor Code § 1640.5.

We may omit any discussion of the gross impropriety of the interference by the Legislature in a pending case. The petitioner desires to present to this Court merely the question of legislative power.

That the interpretation of a statute is a judicial function and not a legislative one hardly needs argument to prove. It has been so held by this Court on a number of occasions.

Elmendorf v. Taylor, 23 U. S. 152;
Bank of Hamilton v. Dudley's Lessee, 27 U. S. 492.

It has been held that the recital in a statute that a former statute was repealed is not conclusive, since interpretation is a judicial and not a legislative function. *U. S. v. Claflin,* 97 U. S. 546.

Even if weight may be given to a legislative statement of the intent of a previous act, this statement *may not control judicial action. U. S. v. Stafoff,* 260 U. S. 477, 480. And in that case, this construction was rejected.

In this case the Supreme Court of California (*supra,* p. 22) clearly regarded itself as controlled by the words of the Legislature. It accepted the

amendment as controlling it on the question of what the section 36, as passed in 1927, meant, and that is precisely what the Constitution forbids them to do.

In other words the determination of this case by the highest Court of the state was made under the control of a non-judicial body.

The Constitution of California expressly states (Art. III, § 1), that the three powers of government shall be separate and that "no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function belonging to either of the others".

Even if that had not been so stated, the principle that judicial action can be undertaken only by a duly qualified Court is implied in our entire scheme of government. It is of course true that judicial power might have been conferred by the Constitution of California on the Legislature, or on one of its branches. But that is precisely what has not been done. On the contrary, judicial power has in set terms been denied to the Legislature.

Due process of law is concerned not merely with the initial stages of judicial procedure but with all * * * its stages.

As an illustration that actions of appellate tribunals as well as of other governmental agencies are governed by the Constitutional provision for due process, we may cite:

Lutcher & Moore Lumber Co. v. Knight, 217 U. S. 257, 266.

As said by Justice Coleman in *U. S. v. 43.7 Acres of Land,* 43 Fed. Supp. 345, 352:

> "The judicial process, once fairly invoked, must be kept inviolate in all its stages, without fear or favor."

The Supreme Court of California when it accepted, as controlling it in its judicial functions, this attempt of the Legislature to interpret a past statute, is in effect delegating judicial power which is forbidden by our constitutional system.

Cf.:

Van Slyke v. Ins. Co., 39 Wis. 390. 20 Am. Rep. 50;

State v. Noble, 118 Ind. 350, 21 N. E. 244.

We may add the case of

Bullock v. McGerr, 23 Pac. 980; 14 Colo. 577, where in a syllabus prepared by the Court, it is held that:

> "The Supreme Court alone can promulgate opinions and render judgments, and its duty is not discharged by the adoption *pro forma* of the conclusions of the Supreme Court Commissioners."

This is cited by this Court in *Butler v. Gage,* 138 U. S. 52, 59.

If the Supreme Court had declared that its judgment of reversal was determined by the interpretation placed on a statute by a group of private persons, that would be contrary to due process. So far as a judicial

function is concerned, the Legislature of the State is a group of private persons and a judgment made under its direction is just as clearly a judgment without due process.

POINT III.

THE AMENDMENT OF 1947 IS UNCONSTITUTIONAL IN THAT IT IMPAIRS THE OBLIAGTION OF A CONTRACT CONTRARY TO ARTICLE I, SECTION 10, OF THE CONSTITUTION OF THE UNITED STATES.

It is possible to interpret the Amendment of 1947 (*supra*, p. 24) not as an unconstitutional attempt to exercise a judicial function and thus to deprive the petitioner of her contract-rights without due process of law, but in a slightly different way. In order to give the most favorable construction to it, it might be interpreted as a statute determining that option-contracts come within Section 36.2 of the Civil Code and further that this provision is to have retroactive effect.

There is no doubt that in civil matters, the Legislature has the power to pass a retroactive statute.

Welch v. Henry, 305 U. S. 134.

This, however, is conceded to be fundamentally inequitable and no such effect will be given unless it expressly appears from the wording and purpose of the statute.

But in any case, a retroactive effect cannot be given, if to do so would deprive any person of prop-

erty—including contract rights—without due process of law, or if it would impair the obligation of a contract.

Charles River Bridge v. Warren Bridge, 36 U. S. 420, 539-540;

Shreveport v. Cole, 129 U. S. 36, 43;

Oshkosh Waterworks Co. v. Oshkosh, 187 U. S. 437, 446.

In *Ogden v. Saunders,* 25 U. S. 213, a retroactive law which impairs the obligations of contracts was defined as "a law which enlarges, abridges or in any manner changes the intention of contracting parties."

Further in *Rairden v. Holden,* 15 Ohio St. 207 at 210, the definition of Story was cited and approved.

> "Upon principle, every statute which takes away or impairs vested rights, acquired under existing laws, or creates a new obligation, imposes a new duty, *or attaches a new disability*, in respect to transactions or considerations already passed, must be deemed retrospective."

And the case goes on to declare that, on the basis of this statement, a law which, while not unconstitutional in itself by the mere fact of being retrospective, was unconstitutional if it changed obligations already in existence.

While it is admitted that the Legislature may change the age of majority, and by implication may change the privileges of infancy, it may not do so in

respect of persons, when rights in a particular contract have already accrued before the enactment. Cf.

Pickering v. Peskind, 183 N. E. 301, 303, 43 Ohio App. 401;

Springstun v. Springstun, 131 Wash. 109, 229 Pac. 14;

Smith v. Smith, 104 Kan. 629, 180 Pac, 231;

Dougal v. Fryer, 3 Mo. 40, 22 Am. Dec. 458;

Reisse v. Clarenbach, 61 Mo. 310;

Wilson v. Greer, 50 Okl. 387, 151 Pac. 629;

Nahorski v. St. Louis Elec. Ry., 310 Mo. 227, 274 S. W. 1025.

That the Amendment of Civil Code § 36.2 impairs the obligation of an existing contract, is clear. The contract made between the petitioner Brodel and Warner Brothers so far as the options were concerned was, as contended by the petitioner and as appears from the opinion of the Supreme Court, a one year contract for services and four option contracts. Omitting for the present, the question of the constitutionality of the classification as set forth above in Point I (*supra,* p. 10), the petitioner's contract was subject to the limitation of Civil Code § 36.2 *as it stood in 1927,* only *as to the contract for services.* The option contracts although contained in the same document, were separate contracts.

If the statute of 1947 is construed in the most favorable way for constitutionality, it is an attempt in 1947 to make the contracts the petitioner entered into in 1927—a contract for services and four optio. contracts—into a single contract and applying the rule

that the approval of the contract for services, shall carry with it, approval of

> *"all the terms and provisions thereof, including but without being limited to, any optional or conditional provisions contained therein for extension, prolongation or termination of the term thereof."*

As has been pointed out, these words do not appear in the statute of 1927, under which the petitioner made her contract. To apply them, after twenty years, to her contract, imposes on her a contract she did not make at all, and deprives her of the right of rescinding her option contracts, which not *being contracts for services* did not come under the 1927 statute,—assuming for a moment that a statute would be valid even for contracts for services, rendered by an arbitrarily selected class of minor employees.

No more drastic impairment of a contract can be imagined than that of turning a rescindable contract into a nonrescindable one.

In the recent Minnesota case of

In re Davidson, 26 N. W. (2d) 223,

which went as far as possible in accepting the right of the Legislature to change the age of majority and thereby deprive persons of privileges which they assumed they had, the following note was appended at the end.

> "Although the issue is not involved in the instant case, it is helpful to an understanding of the nature of the *status* to observe that amendatory legislation postponing the age of majority has

been held not retroactive so as to effect pre-existing substantive rights which have come to fruition before the amendatory act took effect."

The Court goes on to quote more of the cases cited above.

Under these circumstances, it is urged that the Legislature may not constitutionally, either by assuming to "interpret" a law passed twenty years earlier, or by retroactive amendment, deprive the petitioner here of the substantive rights arising out of a contract she had made under the law as it existed before the amendment.

Dated, Berkeley, California,
July 30, 1948.

Respectfully submitted,
MAX RADIN,
BROWN, FENLON, LUND AND BABCOCK,
BERNARD M. FITZGERALD,
Attorneys for Petitioner.

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

CASES

STATUTES

IN THE

Supreme Court of the United States

October Term, 1948
No. 233

JOAN BRODEL (professionally known as Joan Leslie),
Petitioner,

vs.

WARNER BROS. PICTURES, INC. (a corporation),
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Petitioner seeks review by this Honorable Court of a decision rendered by the Supreme Court of the State of California reversing a judgment of the trial court (Superior Court, Los Angeles County), which judgment had dismissed a complaint following an order sustaining a general demurrer thereto without leave to amend.

Statement of the Case.

The facts of the case are set forth in the decision of the Supreme Court of the State of California rendered on appeal from the judgment (*Warner Bros. Pictures, Inc., v. Joan Brodel,* 31 A. C. 819, 192 P. (2d) 949 [R. 14-28]). The opinion, describing the manner in which the cause arose, states [Opin. 5th para. R. 15]:

> "Basing its cause of action on the foregoing facts alleged in its complaint . . . plaintiff brought

this action for declaratory relief and for an injunction preventing defendant Brodel from performing and the other defendants from causing her to perform dramatic services for anyone except plaintiff. The trial court sustained demurrers interposed by defendants without leave to amend and dismissed the action. Plaintiff appeals."

The facts alleged in the complaint [R. 1-12], to which the general demurrer was interposed [R. 12], show the following situation [Opin. R. 14-15; Complaint, R. 1-12]: Petitioner, then a minor seventeen years of age, executed a written agreement with respondent, as a producer of motion pictures, on March 27, 1942, under which petitioner agreed to perform dramatic services exclusively for the respondent for an aggregate period of approximately seven years, consisting of seven successive fifty-two week periods at increasing rates of salary per year commencing at $600 per week and reaching the sum of $2,250 per week. Such contract at the time of its execution was submitted to, and after full hearing was approved by, the Superior Court of Los Angeles County. Petitioner performed under the contract for approximately four years and then, upon reaching the age of majority, purported to disaffirm the contract in its entirety and immediately undertook to contract her services to other producers of motion pictures.

Section 36 of the Civil Code of the State of California, as it read at all times herein relevant, is as follows:

"36. *When Minor May Not Disaffirm.* A minor can not disaffirm a contract, otherwise valid, to pay the reasonable value of things necessary for his support, or that of his family, entered into by him when not under the care of a parent or guardian able to provide for him or them; provided, that these things have been actually furnished to him or to his family.

A minor can not disaffirm a contract, otherwise valid, to perform or render services as actor, actress, or other dramatic services, as participant or player in professional sports, including, but without being limited to, professional boxers, professional wrestlers and professional jockeys, where such contract has been approved by the superior court of the county where such minor resides or is employed. Such approval may be given on the petition of either party to the contract after such reasonable notice to the other party thereto as may be fixed by said court, with opportunity to such other party to appear and be heard." (Calif. Stat. 1941, Chap. 734.)

Said statute was amended by the State Legislature in 1947, after the decision of the lower court and prior to the decision of the Supreme Court of California in this case. Its text appears as a note to the opinion [R. 22].

Questions Presented.

Petitioner attempts to invoke the jurisdiction of this court as applicable to a "final judgment" under Section 237b of the Judicial Code. The first question for consideration is whether the decision here presented is actually final.

Petitioner, assuming jurisdiction to exist, purports to present three constitutional questions (Pet. 2). The second and third of her questions have no factual foundation, but appear based upon an erroneous assumption that an amended statute was herein applied retroactively. The remaining question attempted to be presented is whether Section 36 of the Civil Code of the State of California contains unreasonable and arbitrary classifications in violation of the equal protection clause of the Fourteenth Amendment.

Summary of Argument.

Petition for certiorari in the case at bar is opposed for the following reasons:

1. The decision of the Supreme Court of the State of California is neither final nor complete, in that in effect it merely overrules a demurrer to an original complaint.

2. There is no violation of the equal protection clause of the Fourteenth Amendment in that the actual classifications in the statute are reasonable. Petitioner cannot complain that other classes might have been included.

3. The opinion of the Supreme Court of the State of California does not attempt to apply the 1947 amendment of the statute to the contract retroactively, or otherwise.

4. The question presented is not a federal question of substance nor of general public importance.

ARGUMENT.

I.

The Decision of the Supreme Court of the State of California Is Not a Final Judgment Subject to Review by This Honorable Court.

The jurisdiction of this court to review a state court judgment is confined to one which is final. In *Market Street Railway Company v. Railway Commission of California*, 324 U. S. 548, 65 S. Ct. 770, 89 L. Ed. 1171, such rule is stated, and it is said:

> "Final it must be in two senses: It must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court."

The decision at bar is of a final court, but it clearly does not determine the litigation. The decision of the Supreme Court of the State of California merely reverses a judgment of the trial court dismissing an original complaint following the sustaining of a general demurrer. There has been no trial of the cause and the statement of petitioner (Pet. 5) concerning a "new trial" is entirely misleading. There has been no decision upon the merits by any court. The opinion of the Supreme Court of the State of California itself indicates the possible amendment to the complaint and the necessity of proof before any relief is granted on the complaint [R. 23-24]. In any case, petitioner has the right, now that her demurrer has

been overruled, to answer upon such terms as the trial court may deem just. Such right is given by Section 472a of the Code of Civil Procedure of the State of California, which, so far as is here relevant, provides:

> "When the demurrer to a complaint, or to a cross-complaint, is overruled, and there is no answer filed (or entered), the court may, upon such terms as may be just, allow an answer."

Petitioner states that the present decision (Pet. 5) obviously forecloses her from all defenses she could possibly raise. She thereby confesses she may have no defense on the merits, but such statement is not the equivalent of a confession of judgment in the trial court, nor can she, at her option, convert a pending action into a final judgment by such a statement. The fact remains that petitioner has not yet pleaded or attempted to plead any defense nor confessed judgment, nor has her default been taken, and the action is still pending and still undetermined on its merits.

Petitioner is still entitled to answer and put in issue even the execution or existence of the contract alleged in the complaint, or any other issue of fact or law she may desire (other than whether the present original complaint on its face states a cause of action). Not until that point is reached in the trial court will there be, or can there be, any decision on the merits or any judgment against the petitioner.

It has long been held that decisions with respect to pleadings, particularly with respect to demurrers, are not final judgments reviewable by this Honorable Court.

In *Meagher v. Minnesota Thresher Manufacturing Co.*, 145 U. S. 608, 12 S. Ct. 876, 36 L. Ed. 834, a judgment of the Supreme Court of Minnesota affirming an order of the trial court overruling a demurrer to a petition for sequestration of assets was held not a final judgment. In that case this court stated, after so ruling, in the final sentence of the opinion that,

> "This is also true of a judgment merely affirming an interlocutory order, however apparently decisive of the merits."

Even in cases where the highest court of the state has directed that a demurrer be sustained, instead of being overruled as in the case at bar, this court has held that the judgment was not final. (*Great Western Telegraphic Company v. Burnham*, 162 U. S. 339, 16 S. Ct. 850, 40 L. Ed. 991, and *Clark v. Kansas City*, 172 U. S. 334, 19 S. Ct. 207, 43 L. Ed. 467.)

In *Louisiana Navigation Co. v. Oyster Commission*, 226 U. S. 99, 33 S. Ct. 78, 57 L. Ed. 138, and *Bostwich v. Brinkerhoff*, 106 U. S. 3, 1 S. Ct. 15, 27 L. Ed. 73, the highest state courts had, as here, reversed the judgments of the trial courts sustaining demurrers, and in each case the judgment of the highest state court was held not final for the purpose of review by this Honorable Court. In *Louisiana Navigation Co. v. Oyster Commission*, the assertion was likewise made, as here, that the opinion of the Supreme Court of Louisiana therein practically disposed of the major question. This court nevertheless dismissed the cause for want of jurisdiction and stated that it was set-

tled that this court would not review by piece-meal the action of a state court and that on the question of finality the form of the judgment is controlling.

Petitioner (Pet. 3-7) has cited precedent of general import to the effect that a review by this court is proper if the decision below is in fact final, whether or not so denominated under state practice. Such cases are not here applicable where the decision in question is a mere ruling on a matter of pleading, leaving the case in the trial court with a complaint on file, a demurrer overruled, and no answer or other responsive pleading having yet been presented by petitioner. Clearly at the present time, even though the Supreme Court of the State of California has ruled upon the meaning and constitutionality of the statute involved, nevertheless the stage of proceeding is such that petitioner as defendant could still attempt to show that the statute is not in fact applicable.

No case has been made in the trial court. No judgment exists against petitioner, nor any determination as yet other than that the existing complaint states a cause of action. The specific cases involving demurrers cited herein are, we submit, decisive.

II.

It Clearly Appears That Section 36 of the Civil Code of the State of California as It Stood Prior to the Amendment of 1947 Is Proper in All Respects.

Petitioner generally asserts as her Point I (Pet. Br. 10-22) that the classifications included in the statute are arbitrary and without reasonable foundation.

The statute in its second clause prohibits the disaffirmance by a minor of a contract to render services as either (a) an actor, actress or other dramatic service, or (b) as a participant or player in professional sports. There are two and not three classifications as asserted by petitioner.

Petitioner concedes that these classes have a common characteristic and that such persons so employed must have exceptional skill and talent and that (Pet. Br. 13), "This certainly is a natural and intrinsic element." Her major complaint is that the statute does not also include infant prodigies of other types, such as musicians, scientists and inventors (Pet. Br. 13, 15, 22).

It is well established that any statutory classification is valid if any set of facts can be reasonably conceived which would justify it.

Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 31 S. Ct. 337, 55 L. Ed. 369;

Madden v. Kentucky, 309 U. S. 83, 88, 60 S. Ct. 406, 84 L. Ed. 590;

Clark v. Paul Gray, 306 U. S. 583, 59 S. Ct. 744, 83 L. Ed. 1001.

In the *Lindsley* case it is said that the equal protection clause of the Fourteenth Amendment avoids a classification

only when it is without any reasonable basis and is, therefore, purely arbitrary and that,

> "When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed."

In *Clark v. Paul Gray, supra,* a traffic regulation case, it is said that the function of a court upon such a question "is only to determine whether it is possible to say that the legislative decision is without rational basis."

Since petitioner herself asserts that the actual classifications under the statute, to-wit: minors rendering dramatic services and those engaged in professional sports, involve a common characteristic which does afford a natural and intrinsic element of distinction, she is relegated to the wholly untenable argument that other possible groups have not likewise been included. A statute is not objectionable merely because it does not include all cases which might theoretically be included within its scope with equal reason.

> *Middleton v. Texas Power Co.,* 249 U. S. 152, 157, 158, 39 S. Ct. 227, 63 L. Ed. 527;
>
> *Rosenthal v. New York,* 226 U. S. 260, 270, 271, 33 S. Ct. 27, 57 L. Ed. 212.

A state legislature is not bound to extend its regulation to all cases which it might possibly reach, but is free to recognize degrees of harm and confine its regulation to those classes where the need is determined to be the clear-

est. It may adjust its legislation according to the existing exigency.

Price v. Illinois, 238 U. S. 446, 35 S. Ct. 892, 59 L. Ed. 1400;

West Coast Hotel Co. v. Parrish, 300 U. S. 379, 57 S. Ct. 578, 81 L. Ed. 703.

In the *Parrish* case it is said:

"There is no 'doctrinaire requirement' that the legislation should be couched in all-embracing terms."

And in *Madden v. Kentucky,* 309 U. S. 83, 60 S. Ct. 406, 84 L. Ed. 590, it is held that:

"The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it."

Even without fixation of such standards, we submit it is plain that the classification has a reasonable basis demonstrable from matters of common knowledge. As noted, petitioner concedes the existing classifications have a natural and intrinsic basis as involving minor employees requiring exceptional skill and talent. Southern California is known as the center of production of radio programs and motion pictures (which fields commonly employ many actors and actresses), while it is not necessarily a major source of infant musicians, scientists or inventors. Minor inventors and musicians are rarely employed on long-term contracts; while actors commonly are. Employment in motion pictures differs from all other callings in that the

services of an actress are indelibly recorded as rendered on film and in sound so that after production commences there can rarely be a substitution or replacement of an actress portraying a part therein. If such actress were privileged to repudiate her contract halfway through the picture, enormous loss would accrue to the employer, since the production would have to be started all over. Under such circumstances, a producer could not afford to employ a minor, to the detriment of the class. The statute here, since 1927, has, therefore, prohibited disaffirmance of such a contract by a minor.

An infant prodigy of the nature of a musician or an inventor would be employed as a prodigy already possessing inherent natural characteristics, and able to render valuable service, while a child actress is frequently selected because of her beauty or personality and is thereafter trained and publicized by her employer in the hope of developing latent talent or charm into a star personality acceptable to the public. The process is long and expensive, and the risk can be assumed only on the basis of a long term contract which is mutually enforceable. This is the history of petitioner herself, as alleged in the complaint [R. 8-9, para. XI]. No coercion or unfairness is possible, since the contract must be approved by a competent court after notice and hearing under the statute, and certainly no minor need accept such employment—or the large salaries paid. None of these elements apply to the general run of minors or to infant prodigies of other types.

The Supreme Court of the State of California in its opinion summarized the situation with precision when it said:

> "It can hardly be questioned that there are reasonable grounds for the statutory provisions withdrawing the right of disaffirmance from minors with regard to contracts to render services in the professions specified in section 36, if such contracts are found reasonable by a court in a special proceeding for the examination thereof. Whether certain other groups of minors engaged in professions similar to those specified in section 36 should be included in the section is a matter of legislative discretion. New legislation such as this ordinarily first covers the fields where it is most urgently needed, and may be extended in the light of experience."

Even the dissenting opinion of Justice Shenk, though differing from the majority of the court as to the meaning and scope of the statute, concurred without question in the conclusion that the statute was constitutional.

In essence, petitioner has challenged the Legislature's classification not on the ground that she does not belong within the class, but on the ground that some others, who might have been included, have been omitted.

III.

The Supreme Court of the State of California Has Not Applied or Attempted to Apply the 1947 Amendment of Section 36 of the Civil Code of California to the Contract Herein Involved and There Can Be No Absence of Due Process or Impairment of Contract in the Premises.

Petitioner has attempted to present in her second and third questions (Pet. 2) and in her second and third points (Pet. Br. 22-33) the issues of due process and impairment of obligation of contract. She apparently does so because the Supreme Court of the State of California [R. 22] referred to the amendment of Section 36 of the Civil Code adopted by the California Legislature in 1947 and effective September 20, 1947. Petitioner is certainly in error, as is apparent from reading the opinion, in assuming that the Supreme Court of the State of California accepted the text of the 1947 amendment as controlling or as applicable as the law of the contract in this case.

The major dispute in the courts below concerned the meaning of the words contained in Section 36 of the Civil Code of California as it existed at the time the contract herein involved was entered into (1942), was approved by the Superior Court (1942), at the time of the attempted disaffirmance of her contract by the petitioner Brodel (1946), and at the time of the entry of the judgment of dismissal of the cause growing out of such attempted disaffirmance (1947). Consideration of the constitution-

ality of the statute could not be given until its meaning had been determined.

To determine the meaning the Supreme Court of the State of California in its opinion discussed the language and scope of the statute extensively [R. 16-22]. It reached its conclusion as to the meaning of the section as it then stood on the basis of logic, reason and prior authority. It then in one short paragraph referred to the 1947 amendment [R. 22], but the opening language of such paragraph of the opinion reads:

> "We are here concerned with Section 36, as it read before the 1947 amendment."

Such reference to the amendment and its language is merely by way of additional assistance in determining the construction of the statute as it existed at all times herein relevant. It concluded that the earlier statute actually had the same intent, meaning and coverage as the Legislature stated in detail in the amendment, but there is nothing to indicate that the Supreme Court of the State of California thereby declared itself subservient to the Legislature in this respect. Even the petitioner concedes that a court may give weight to a legislative statement of the intent of a previous act (Pet. Br. 26). This the California court did do. It may have found such legislative statement persuasive, but there is absolutely nothing to indicate any control or coercion of judicial action.

Petitioner erroneously assumes that the 1947 amendment was substantively different from the prior statute and was retroactively applied in this cause. Her abstract

theories as to control of the courts and impairment of contract by retroactive legislation are entirely inappropriate. The Supreme Court of the State of California concluded that the earlier statute and the amendment had the same meaning, scope and effect. It reached this conclusion after extended analysis and not merely because of any statement by the Legislature in the amended statute. It reached its ultimate conclusion as a result of six pages of analysis of the relevant statute before even mentioning the amendment as a final and perhaps persuasive element.

The decision of the state court here as to the meaning and application of the statute is conclusive, and presents no issue.

> *Morehead v. New York,* 298 U. S. 587, 56 S. Ct. 918, 80 L. Ed. 1347;
>
> *Lindsley v. National Carbonic Gas Co.,* 220 U. S. 61, 31 S. Ct. 337, 55 L. Ed. 369.

It may be noted that throughout Point III of her brief petitioner refers to Section 36.2 of the Civil Code of California, which code section is actually one that concerns the jurisdiction of the Superior Court over savings plans and trusts established to protect the earnings or estates of minors gained or acquired in connection with personal service contracts. Section 36.2 is not even remotely connected with the present case and we must assume that reference to the statute by petitioner is a result of preoccupation with theory, or inadvertence.

IV.

The Question Presented Is Not a Federal Question of Substance nor of General Public Importance.

The statute in question was amended in 1947. The 1947 amendment and its validity has not been passed upon, and cannot be in issue in this present case.

The combination of circumstances giving rise to the controversy here, in view of the intervening amendment, is probably unique. The principles of law involved which govern the situation are not new. The specific, and now replaced, statute, so far as here relevant, covers a situation which is not duplicated, we believe, in any other state and is probably unique to Southern California, in view of the fact that a tremendous portion of the motion pictures produced for public consumption are there produced. There is no dispute or conflict as to the basic principles involved.

Conclusion.

It is respectfully submitted that the petition for certiorari should be denied.

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EUGENE D. WILLIAMS,
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FRESTON & FILES,
RALPH E. LEWIS and
GORDON L. FILES,
Of Counsel.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1948

No. 233

JOAN BRODEL (professionally known as Joan Leslie),
Petitioner,

vs.

WARNER BROS. PICTURES, INC. (a corporation),
Respondent.

PETITION FOR A REHEARING.

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Table of Authorities Cited

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PETITION FOR A REHEARING.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petitioner, Joan Brodel, respectfully petitions this Honorable Court for a rehearing on her petition that a writ of certiorari issue to the Supreme Court of the State of California in the above entitled cause.

The petition for a writ of certiorari was duly filed before the Court and on October 18, 1948, was denied.

The reason for requesting a rehearing under Rule 33, Section 2 of the Rules of the Supreme Court as amended on October 13, 1937, is the following:

It appears affirmatively from the appended affidavits, Appendices A, B, C and D that the contract sued upon in the Court below, a copy of which was made part of the record and is before this Court in the petition for a writ of certiorari, denied on October 18th, that the alleged contract contained a series of options, that these options were six in number and that the options prior to the commencement of this action on April 15, 1946, were exercised by the respondent, and that the last option under the alleged contract, even if valid, would have had to be exercised at least thirty (30) days before March 30, 1948, in order to create a contract.

It appears further that this option which if valid should have been exercised on February 29, 1948, was not exercised at all, either at that time or at any time since.

It appears consequently, that even on the respondent's own showing, there is not now and there has not been since March 31, 1948, any contract of any sort between the plaintiff and defendant, and consequently there is no contract for the breach of which an action for an injunction could possibly lie.

What a moot question is has often been decided. The following cases give the general rule.

That equity case is "moot" in which no decree consistent with the pleadings and existing facts will benefit any party as against the other parties to the litigation.

U. S. v. Pan-American Comm., 261 F. 229, 231.

A "moot case" is one which seeks to determine an abstract question which does not rest upon existing facts or rights.

Adams v. Union R. R., 42 A. 517, 21 R.I. 140, 44 L.R.A. 273.

Where, in course of proceeding in a litigated matter, the controversy between the parties comes to an end, either by act of the parties or by operation of law, question becomes moot.

Walling v. Shenandoah-Dives Mining Co., 134 F. (2d) 395, 396.

Courts will not continue to litigate controversy that has ceased to exist.

State ex rel: *Banghman v. Woodruff*, 106 S. W. (2d) 1088, 1089.

An appeal from discharge in *habeas corpus* became moot when the sentence had expired.

Patterson v. Jones, 141 F. (2d) 319, 321.

No allegation was ever made by the respondent that notice of exercising the option on February 29, 1948, was ever given to petitioner on that date or at any other time. In the brief filed by respondent before the Supreme Court of California in opposition to the petition for a rehearing, the respondent alleged that the letter of May 7, 1946 (Appendix C) was the equiv-

alent of such a notice of exercising an option. Since nearly a year later, on February 7, 1947, (App. D) the respondent duly exercised the fifth option, it is impossible to see how the letter of May 7, 1946, could have been the exercise of the sixth option. On the allegations of the respondent's complaint, the existence of these options is fully admitted as well as the duty of exercising them at the time specified. It was specially and insistently alleged by the respondent that its claim against the petitioner was based on the seasonable exercise of its options each year, thirty days before March 30 of that year.

The petitioner, therefore, had a legal right, even if her contentions on the illegality of the contract under the Fourteenth Amendment to the Constitution of the United States, were rejected, to have it determined that the controversy so far as it dealt with any duty of the plaintiff to perform services for the defendant after March 30, 1948, was wholly and entirely moot, and that there could be no issue raised between the petitioner and the respondent based on the existence of any contractual obligations after that date.

That a controversy which was in every sense a perfectly valid one may become moot by matters supervening pending an appeal is apparent from the following cases.

Where it clearly appears by reason of changed circumstances between the time of the trial of the action and its review by the Supreme Court, that any judgment the Supreme Court may render will be unavail-

ing as to the particular issue litigated, the Supreme Court ordinarily will not consider and decide the "moot question" whether of law or fact.

Dickey Oil Co. v. Wakefield, 153 Kan. 489, 111 P. (2d), 1113, 1114, 1115.

Termination of contract caused question of breach to become a moot question.

McDonald v. Brewery Drivers Union, 215 Mont. 274; 9 N. W. (2d) 770, 772.

Whether applicant for appointment as administrator was disqualified by reason of his non-age at time of application, was a "moot question" when applicant had reached age of twenty-one before disposition of his appeal.

Hoch v. Hoch, 163 S. W. (2d) 433, 436.

In *Dexter v. Superior Court,* 15 Cal. (2d) 405, it was decided as a matter of course that if a man died after conviction of a crime but before a fine was imposed, no such fine could be imposed, since the issue of punishment had become moot. Similarly, in *Morrow v. Morrow,* 62 Nev. 492, when the defendant in a divorce suit died, after the divorce had been granted, and before appeal, the issue became moot. Conceivably in a different system of law, the fine could still be imposed on his estate, or alimony charged against the estate of a deceased. But that is not our law.

For the Supreme Court of California to refuse to pass on the question of such importance as this, to-wit, whether a controversy had become moot, and to refuse when it must have clearly appeared on examina-

tion that it was moot, is to deny the petitioner her day in Court on this question.

When the appeal was argued before the Supreme Court of the State of California on September 16, 1947, the issue whether the controversy was moot could of course not have been raised. The fifth option on the alleged contract had been fully exercised thirty days before March 30, 1947, and if the contract were a valid one, an obligation to perform services for the respondent for a year from March 30, 1947, would have been in existence.

The Supreme Court held the appeal under consideration from September 15, 1947, to May 3, 1948. No opportunity for further argument was given after the original argument.

On May 3, 1948, the Supreme Court handed down its decision reversing the decision of the District Court of Appeals in favor of the petitioner and deciding adversely to the petitioner on the question of the constitutionality of the law which deprived her of her right of disaffirming after majority the contract made when she was a minor.

Then for the first time, an opportunity was offered the petitioner to present to the Supreme Court of California, her reasons for holding that the controversy had become moot while the Supreme Court was considering the case, since there was no longer a contract which could be breached.

The petitioner therefore duly filed her petition before the Supreme Court for a rehearing of the case, and based her petition primarily on the fact that the

controversy had become moot on March 30, 1948, when for want of seasonable exercise of the option on February 29, there was no contract even on the respondent's own showing, between respondent and petitioner. The Supreme Court of California denied the petition for a rehearing on May 27, 1948. No argument was heard. No reason was given.

It is not alleged by the respondent, and it could not very well be alleged by any one that the Supreme Court of California, claims the power to pass on a moot question. So far from that it has on a number of occasions specifically refused to decide a question for the very reason that during the course of litigation it had become moot.

It is not a question of a legal error. The matter goes to the power of the Court. We may cite *U. S. v. Alaska S. S. Co.*, 253 U. S. 113; 40 S. Ct. 448, 64 L. Ed. 808. The Court states:

> "It is a settled principle in this court that it will determine only actual matters in controversy essential to the decision of the particular case before it. Where by an act of the parties, or a subsequent law, the existing controversy has come to an end, the case becomes moot and should be treated accordingly. However convenient it might be to have decided the question of the power of the Commission to require the carriers to comply with an order prescribing bills of lading, this court '*is not empowered to decide moot questions* or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. * * *' (People

of State of) California v. San Pablo & Tulare R. Co., 149 U. S. 308, 314, 13 S. Ct. 876, 878, 37 L. Ed. 747." (Emphasis added.)

There is therefore a determination by this Court that a Court has *no power* to pass on a moot question and that therefore the Supreme Court of California has attempted to go beyond the province of any Court in doing so. It is a denial of due process of law when a Court acts in a way it is not empowered to act.

More than that, if it had attempted to pass on such a question, it would be clear that in doing so, it was attempting to exercise a non-judicial function.

Due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States, requires the observance of that aspect of separation of powers which has been made a fundamental part of the constitutional law of the United States and is implied in the constitutional duty of the United States to guarantee to each State a republican form of government, Article IV, Section 4.

When a state executive assumes judicial or legislative power, when a state legislature assumes executive or judicial power and when a Court undertakes to act in any capacity, except a judicial one, it violates due process.

It is submitted that under the undisputed facts here presented — since the respondent at no time has alleged and does not now allege that it exercised its option in 1948—the Supreme Court of California was under the Constitution of the United States required

to dismiss the cause before it as moot, and under any circumstances, to have given the petition a hearing on this question which arose after the case had been submitted and while it was under consideration.

It is this opportunity, part of due process of law, which the petitioner now respectfully requests of this Court. It is a question which would not have been properly presented in the petition for certiorari, since that concerned itself with the decision of the Supreme Court of California under a statute asserted by the petitioner to be unconstitutional. It is new matter, not heretofore presented to this Court in this case.

Dated, Berkeley, California,
October 29, 1948.

MAX RADIN,
BROWN, HENLON, LUND AND BABCOCK,
BERNARD M. FITZGERALD,
Attorneys for Petitioner.

I hereby certify that this petition for a rehearing is presented in good faith and not for purposes of delay.

Dated, Berkeley, California,
October 29, 1948.

MAX RADIN,
Attorney for Petitioner.

(Appendices A, B, C and D, Follow.)

Appendix A

MAX RADIN,
Boalt Hall, University of California, Berkeley 4, California,
BROWN, HENLON, LUND AND BABCOCK,
BERNARD M. FITZGERALD,
Washington Loan & Trust Co. Building, Washington, D.C.,
Attorneys for Petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 233

Joan Brodel (professionally known as Joan Leslie),
Petitioner,
vs.
Warner Bros. Pictures, Inc. (a corporation),
Respondent.

AFFIDAVIT OF OSCAR R. CUMMINS.

State of California,
County of Los Angeles.—ss.

Oscar R. Cummins, being first duly sworn, deposes and says:

That I am an attorney-at-law, duly licensed to practice in all the Courts of the State of California, and that I am one of the attorneys for Joan Brodel, pro-

fessionally known as Joan Leslie, the petitioner in the above entitled action.

That at all times during the pendency of the above action, both in the lower Court and the Appellate Courts of the State of California, petitioner Joan Brodel has denied since attaining her majority, that the said alleged contract was, and/or is valid in any way whatsoever, and has, since attaining her majority, maintained the said alleged contract is non-existent and wholly and completely void.

That affiant is averring the following facts which were not brought before this Honorable Court in the original Petition for a Writ of Certiorari by your petitioner:

1. That the said alleged contract provides in Section 3 thereof, employment for a period of fifty-two (52) weeks, and provides in Section 28 thereof, options for the renewal thereof for six (6) successive periods of fifty-two (52) weeks each, and further provides that if respondent herein desires to renew said alleged contract for any such fifty-two (52) week period, it must give notice in writing to the petitioner herein, Joan Brodel, at least thirty (30) days prior to the expiration of each fifty-two (52) week period. That is to say, at least thirty (30) days prior to the 30th day of March of each year.

2. That your affiant knows of his own knowledge that the petitioner Joan Brodel received no notice whatsoever from respondent, indicating its intention to renew the said alleged contract for an additional

fifty-two (52) week period from and after the 30th day of March, 1948; and that the last communications received by the petitioner from the respondent, are those attached hereto and marked Exhibits, "C" and "D", respectively. That as is shown by the attached Exhibits, at all times previously respondent had sent to petitioner Joan Brodel, each year thirty (30) days prior to the expiration of each fifty-two (52) week period, a notice exercising its option to renew the said alleged contract for an additional period of fifty-two (52) weeks. That Section 28 of the said alleged contract, among other things, provides that if the respondent desires to exercise the aforesaid right of option, the said right of option must be exercised consecutively, and that even if the said alleged contract were existent, respondent has failed to comply with the terms thereof, and such failure to comply was of their own volition, and through no act or omission on the part of your petitioner Joan Brodel.

3. That affiant as attorney for petitioner Joan Brodel, has received no such notice indicating the intention of the respondent to renew the said alleged contract for the fifty-two (52) week period beginning March 30, 1948, and affiant avers that the result of such failure and neglect and omission on the part of the respondent to so notify your petitioner, Joan Brodel, or her personal representatives, at least thirty (30) days prior to the 30th day of March, 1948, the said alleged contract has lapsed by virtue of its own terms, and, therefore, in addition to the fact that your petitioner Joan Brodel has denied the existence of the

said alleged contract, respondent has by its own omission rendered the said alleged contract non-existent, and, therefore, said alleged contract has lapsed, and is, therefore, a moot question.

That your affiant on the 20th day of April, 1948, and prior to the decision of the Supreme Court of the State of California on the 3rd day of May, 1948, requested the Honorable Phil S. Gibson, Chief Justice of the Supreme Court, to determine that the above matter was moot and to dismiss the appeal of the respondent Warner Bros. Pictures, Inc.

That your petitioner herein was never given an opportunity to be heard on the moot question herein involved, and is a matter which has never been presented to, nor determined by the Honorable Supreme Court of the United States.

Wherefore, affiant avers that by reason of the failure of the Supreme Court of the State of California to consider the moot question as aforesaid, petitioner was denied her day in Court and denied due process of law in violation of the Constitution of the United States of America.

Oscar R. Cummins.

Subscribed and sworn to before me this 19th day of October, 1948.

(Seal) Mildred Korcheck,
Notary Public in and for the said
County and State.

My Commission expires April 21, 1950.

Appendix B

MAX RADIN,
Boalt Hall, University of California, Berkeley 4, California,
BROWN, HENLON, LUND AND BABCOCK,
BERNARD M. FITZGERALD,
Washington Loan & Trust Co. Building, Washington, D.C.,
Attorneys for Petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 233

Joan Brodel (professionally known as Joan Leslie),
Petitioner,
vs.
Warner Bros. Pictures, Inc. (a corporation),
Respondent.

AFFIDAVIT OF JOAN BRODEL (PROFESSIONALLY KNOWN AS JOAN LESLIE).

State of California,
County of Los Angeles.—ss.

Joan Brodel, professionally known as Joan Leslie, being first duly sworn, deposes and says:

That I am the petitioner in the above entitled action;

That at all times during the pendency of the above action, both in the lower Court and the Appellate Courts, affiant has, since attaining her majority, denied the existence of the said alleged contract in controversy here, and has at all times since attaining her majority maintained that said alleged contract is non-existent and wholly and completely void;

That nevertheless, heretofore and on the following dates, to-wit: February 11, 1943, February 9, 1944, February 16, 1945, February 13, 1946 and February 5, 1947, respondent has notified affiant within the time provided in the said alleged contract, of respondent's intention to take up said option for successive fifty-two (52) week periods as provided therein;

That copies of the said notices in reference to the said option received from respondent, are attached hereto;

That the last such communication which affiant received from respondent pertaining to its intention to take up the said option for an additional period of fifty-two (52) weeks, was on or about the 5th day of February, 1947, whereby respondent notified affiant that it intended to exercise its option for the fifty-two (52) week period ending the 30th day of March, 1948, under the terms of the said alleged contract.

That at no time thereafter has affiant received any notification whatsoever from respondent, of its intention to exercise its option on its alleged contract for a fifty-two (52) week period beginning the 30th day

of March, 1948, and ending the 30th day of March, 1949.

Further, affiant sayeth naught.

Joan Brodel,
Joan Brodel (Professionally known as Joan Leslie).

Subscribed and sworn to before me this 19th day of October, 1948.

(Seal)

Mildred Korchek,
Notary Public in and for the said County and State.

My commission expires April 21, 1950.

Appendix C

Executive Offices
321 West 44th Street
New York

Telephone
Exchange
Holly 1251

Warner Bros.
Pictures, Inc.
West Coast Studios
Burbank, California
May 7, 1946

Miss Joan Brodel (Joan Leslie)
222 North Rose Street
Burbank, California

Dear Miss Brodel:

By notices dated May 2, 1946 and May 4, 1946, and pursuant to the rights granted to us under your contract of employment with us dated March 27, 1942, we directed you to report to the office of our Casting Director, Mr. Friedman, at our studio at Burbank, California, at 10:30 A. M. on Monday, May 6, 1946, for the purpose of commencing the rendition of your services for us under said contract in connection with the production of a motion picture to be produced by us with you appearing therein. You did not report as requested and directed by us nor have you reported to commence the rendition of said services since said date of May 6, 1946.

Therefore, under the circumstances, we desire to advise you that due to your failure, refusal and neglect to report to our studio as directed by us, as aforesaid, we elect to and do hereby exercise the right in said contract granted to us to refuse to pay you

any compensation thereunder commencing May 6, 1946 and continuing thereafter in accordance with the provisions in your said contract set forth, and particularly in accordance with the provisions of paragraph 23 thereof.

We desire to further advise you that we likewise elect to, and do hereby, exercise the right or option in said contract granted to us to extend said contract, and the current term thereof, and all of its provisions for a period equivalent to the period during which we shall not be obligated to pay compensation to you, except as such right of extension may be limited by any provision in said contract provided for.

Yours very truly,
Warner Bros. Pictures, Inc.,
By O. J. Obringer,
Assistant Secretary.

cc—Registered Mail (R.R.R.)
cc: Oscar R. Cummins
California Bank Bldg.,
9441 Wilshire Blvd.,
Beverly Hills, California,

Vitaphone
Reg'd. Trade Mark

Appendix D

Executive Offices
321 West 44th Street
New York

Telephone
Exchange
Holly 1251

Warner Bros.
Pictures, Inc.
West Coast Studios
Burbank, California
February 5, 1947.

Miss Joan Brodel
(Professionally known as Joan Leslie)
222 North Rose
Burbank, California.

Dear Miss Brodel:

With reference to your contract of employment with us dated March 27, 1942, as heretofore modified, amended and/or extended, and referring particularly to subdivision (e) of paragraph 28 of said employment contract, please be advised that the undersigned elects to and does hereby exercise the right or option granted to the undersigned in said subdivision (e) of said paragraph 28 of said contract.

Therefore, the term of your employment is extended for an additional period of fifty-two (52) weeks from and after the expiration of the present term of said contract, upon the same terms and conditions as are contained therein, except that the compensation to be paid you during such fifth extended period shall be the sum of one thousand seven hundred fifty dollars ($1,750) per week.

The exercise hereby of the option granted to us under said subdivision (e) of paragraph 28 of said contract is not to be deemed an acknowledgment by us in any way that the fourth extended period of said contract (being the current period thereof provided for in subdivision (d) of said paragraph 28) is or may be about to expire, nor shall the exercise hereby of the option referred to in said subdivision (e) of said paragraph 28 of said contract be deemed a waiver by us of any rights whatsoever we may have in the premises under the terms of said contract due to or growing out of the circumstances more particularly set forth in our notice to you dated May 7, 1946.

Yours very truly,

Warner Bros. Pictures, Inc.,
By O. J. Obringer,
Assistant Secretary,

cc: Registered Mail (R.R.R.)
cc: c/o Mr. Oscar R. Cummins
California Bank Bldg.,
Beverly Hills, Calif.
(Via Regular Mail &
Registered mail)

Vitaphone
Reg'd Trade Mark

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.
No. 233

JOAN BRODEL (Professionally known as Joan Leslie),
Petitioner,

vs.

WARNER BROS. PICTURES, INC. (a corporation),
Respondent.

ANSWER TO PETITION FOR REHEARING.

Petitioner Joan Brodel has asked for a rehearing by this Honorable Court upon her application for writ of certiorari, denied by this Court on October 18, 1948. Her sole ground is the assertion that the cause had become moot and that the Supreme Court of the State of California had no power to pass upon the moot question, and hence presumably had no power to render its decision on May 3, 1948. [Tr. 14.]

The precise point and the facts were brought to the attention of the Supreme Court of the State of California informally by letters and affidavits prior to the date of decision. After decision petitioner Brodel petitioned that court for a rehearing upon precisely the same arguments. Rehearing was denied May 27, 1948.

The position of respondent Warner Bros. Pictures, Inc. is as follows:

(a) The decision in the State court is not final, but the cause has been remanded for further proceedings in the trial court as shown by the prior brief herein. The expiration of the contract could not make the appeal moot, but if such were the case there is ample opportunity for petitioner to make such point in the trial court.

(b) The precise assertion was made before the Supreme Court of the State of California by petitioner upon affidavit and petition and was decided adversely to petitioner. (Pet. for Rehearing pp. 6-7.) The question is primarily one of fact as to whether proper and timely notices were given and this court does not review the decision of a state court on an issue of fact, even if the record before this court were sufficient to enable such review to be made. However, petitioner's record before this court does not include the contract which is the basis of the action. The complaint has been brought up [R. 1-12] but not the exhibit to the complaint, such exhibit being a copy of the contract in question. Petitioner has also failed to bring before this court the affidavits and other matters presented to the state court in connection with the issue. The new affidavits, set forth as Appendix A and Appendix B respectively to the petition for rehearing, merely state petitioner's own views, which do not include any mention of the effect of paragraph 23 of the contract as referred to in the letter dated May 7, 1946 and included as Appendix C.

(c) As a matter of fact the contract has not expired, as is indicated, if not proved, by the actual record.

A.

The compiaint herein is for breach of contract. The prayer [Tr. 11] is for injunctive relief to prevent violation of contract by rendering services for others in breach thereof, but it is also [Tr. 12] for a declaration of the respective rights and duties under the contract and for all further relief. It is self-evident that an action for breach can be maintained after expiration of a contract. Most actions for damages for breach of a contract are brought after its termination. Injunction is permissible if an award of damages will not constitute adequate compensation for the injury, but the fact that damages are not adequate compensation for the injury has never been held to prevent the award of whatever damages may be proved. The Supreme Court of the State of California in its decision, since the cause came up on demurrer to a complaint, stated [Tr. 23-24]:

> "If plaintiff's allegations state a cause of action and are supported by proof the court may grant it any relief consistent with its cause of action."

B.

Though it is obvious mere termination of the contract, as claimed to exist by petitioner here, would not make the cause moot or the action of the Supreme Court of the State of California improper, it is equally apparent that the petitioner's assertion as to the fact is untenable. Her precise assertion is that a notice of exercise of an option should have been given to petitioner on or before thirty days prior to March 30, 1948. Petitioner prints as Appendix C a copy of a letter to her dated May 7, 1946, and as Appendix D copy of a letter to her dated February 5, 1947.

The complaint itself showed [R. 3, par. VI(c)] an initial period of fifty-two weeks commencing March 30, 1942. It also showed [R. 4-5] that the contract included six additional periods of fifty-two weeks each at varying rates of salary, each of such periods to commence upon the expiration of the immediately preceding period, and each of such optional extensions to be exercised at least thirty days prior to the expiration of the immediately preceding period.

Prior to February 13, 1946, the respondent had exercised three consecutive options of extension, which in the aggregate would have expired March 25, 1946. [R. 6, par. VII.] On February 13, 1946, respondent exercised its option for the fourth of the available six optional periods. Such fourth optional period would, therefore, extend from March 25, 1946, for a period of fifty-two weeks, or until March 23, 1947.

The purported disaffirmance of petitioner Brodel occurred February 20, 1946 [R. 7], or one week after the exercise by respondent of its fourth option. After such disaffirmance petitioner Brodel has been continuously in default, and because of the existence of such default respondent delivered to her the letter dated May 7, 1946 [Appendix C, Pet. for Rehearing], notifying petitioner, so far as is here relevant, that the respondent thereby exercised its right to extend the contract and the current term thereof and all of its provisions for the period of default "in accordance with the provisions of paragraph 23" of the existing contract. As noted, petitioner has not made such contract as part of the record, but for the information of the court, paragraph 23 thereof provides that in the event of a default by the artist her compensation would cease

until such default is cured, and that at the option of the respondent the contract, including the then current term and all its provisions including the time for exercise of any and all subsequent options, would be extended for such period of default, which extension, however, was restricted to a maximum of twelve months for any given default.

Since petitioner was and has been continuously in default at all times since, there was an extension for the maximum permissible period, which maximum additional period of twelve months would, therefore, be added on to the then current term, to-wit, the fourth optional extension. Without extension such fourth period would have terminated March 23, 1947, but under the above circumstances it would not and could not expire prior to March 23, 1948.

Well within the permissible time and more than thirty days before such critical date the next succeeding option was exercised by the letter appearing as Appendix D and dated February 5, 1947, which is applicable to the fifth extended period. The period now in force under such contract, therefore, and as to which the letter of February 5, 1947 is applicable, extends from March 24, 1948 through March 22, 1949.

Petitioner, before the Supreme Court of the State of California and here, completely disregards the fact of the extension attributable to her own deliberate default and which was brought into effect by the letter of May 7, 1946 because of that default.

It may be noted that the option letter of February 5, 1947 [Appendix D] was given long prior to the time it became necessary. It could have been given at any

time up to and including February 23, 1948. There is no contractual restriction as to how early such notice of exercise of option may be given. The only restriction is that it may not be given later than thirty days prior to the expiration of the preceding period. The dates given in the petition for rehearing herein vary slightly from those herein set forth due to the fact that petitioner apparently bases her calculations upon period of one year each, while actually the contract periods are fifty-two weeks.

The contract herein involved cannot be considered as terminated prior to March 22, 1949, and will not then terminate unless respondent fails to exercise its option for the sixth extended period under the contract prior thereto. That time has not yet arrived. The cause is certainly not moot because of any asserted termination. It would not be moot in any case, in as much as there is no final judgment involved but the case rests upon the original complaint under which the respondent, as the plaintiff therein, is entitled to such relief as it can at the proper time justify by proof.

Respectfully submitted,

ROBERT W. PERKINS,
EUGENE D. WILLIAMS,
Attorneys for Respondent.

FRESTON & FILES,
RALPH E. LEWIS, and
GORDON L. FILES,
Of Counsel.